No. 91-1448

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ANDREW C. PUTKA,

Petitioner,

vs.

FIRST CATHOLIC SLOVAK UNION OF THE UNITED STATES OF AMERICA AND CANADA, JOSEPH R. KRISTOFIK, THOMAS J. GUIDISH, CYRIL M. FERENCHAK, STEVEN G. LUCA, REV. CHARLES HAWKINS, GEORGE YAKUBISIN, ANDREW S. BENO, ANDREW MICEK, JOSEPH J. KRAJSA, EDWARD G. YUHAS, REGIS BREKOSKY, CHARLES M. TEREK, STEVE YUSKO, MICHAEL RAGAN and MICHAEL DOBIS,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

1. Where a fraternal insurance society, subject to pervasive regulation and supervision by the state, expels a member-policyholder of a subordinate district that contested a reorganization plan prepared and submitted by the national officers to the state insurance department for approval, is there a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.

2. Whether federal constitutional safeguards are implicated when a state court fails to accord a member-policyholder of a fraternal insurance society all of the existing remedies expressed in the law of the land for the protection of his rights.

3. Whether the actions of a fraternal insurance society are violative of the free speech and due process clauses, respectively, of the federal constitution when taken to expel an attorney-member for having represented his district branch in a controversy with the national officers.

4. Whether a fraternal insurance society that publishes defamatory falsehoods in its newspaper about a member-policyholder, who is neither a public official nor a public figure, may claim constitutional privilege against liability for the injury inflicted by those statements.

PARTIES TO PROCEEDING

The parties to this proceeding are those indicated in the caption of the case, to wit: Andrew C. Putka, First Catholic Slovak Union of the United States and Canada; Joseph R. Kristofik, Thomas J. Guidish, Cyril M. Ferenchak, Steven G. Luca, Rev. Charles Hawkins, George Yakubisin, Andrew S. Beno, Andrew Micek, Joseph J. Krajsa, Edward G. Yuhas, Regis Brekosky, Charles M. Terek, Steve Yusko, Michael Ragan, and Michael Dobis.

TABLE OF CONTENTS

	Pages
Questions Presented.....	i
Parties to Proceeding.....	iii
Table of Contents.....	iv
Table of Authorities.....	iv
Opinions Below.....	2
Jurisdiction.....	2
Constitutional Provisions Involved...	3
Statement of the Case.....	3
Statement of the Facts.....	9
Reason for Granting the Writ.....	17
Conclusion.....	51

TABLE OF AUTHORITIES

CASES:

Armstrong v. Duffy, 90 Ohio App., 233, 251.....	37,38
Baltimore & Ohio R.R. Co. v. Stankart 56 Ohio St. 224, 232.....	28
Butler v. Perry, (1916) 240 U.S. 328, 333.....	39
Bricklayers', Plasterers' and Stone Masons' Union v. Bower, 183 NYS 855.....	36

TABLE OF AUTHORITIES--Continued

	Pages
Brinkerhoff-Faris v. Hill (1930), 281 U.S. 673.....	41,43
Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc. (1985), 472 U.S. 763, 105 S. Ct., 2639.....	51
Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323.....	51
Jackson v. Metropolitan Edison Co., (1974), 419 U.S. 345, 351.....	20
Lugar v. Edmondson Oil Co., 457 U.S. 937.....	20
Meyers v. Jenkins, 63 Ohio St. 101...	27
National Collegiate Athletic Association v. Tarkanian (1988), 109 S.Ct. 454.....	22
New York Times Co. v. Sullivan (1964), 376 U.S. 254.....	49
Perez v. Scripps Howard Broadcasting Co. (1988), 35 Ohio St.3d 215, 218..	49
Postal Telegraph Cable Co. v. Newport (1918), 247 U.S. 464.....	41,43-45
State ex rel. Fritter v. Fraternal Mystic Circle, (Ohio), 9 C.C. 364...	34,36
Yokel v. German American Bund (1940), 20 NYS 2d 273.....	36

TABLE OF AUTHORITIES--Continued

TEXTS:

4 American Jurisprudence 466, 472, Section 17..... 36,37

American Jurisprudence 2d, Volume 26, Section 52..... 28

16C C.J.S., Constitution Law, Section 949..... 40

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TO THE SUPREME COURT OF OHIO

Petitioner, Andrew C. Putka, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court

of Ohio entered in this proceeding on December 11, 1991.

OPINIONS BELOW

The Supreme Court of Ohio dismissed petitioner's appeal sua sponte "for the reason that no substantial constitutional question exists," without rendering an opinion. The Journal Entry and Opinion of the State Court of Appeals is unreported. It appears, along with the Entry of the Supreme Court of Ohio, in the appendix hereto. The trial court entered an order, without opinion, granting summary judgment for the respondents on all claims.

JURISDICTION

The judgment entry of the Supreme Court of Ohio was entered on December 11, 1991, and this petition for certiorari was timely filed within 90 days of that date. This

Court's jurisdiction is invoked under 28 U.S.C.,Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law...abridging the freedom of speech....

Fourteenth Amendment, Section I:

> ...nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner filed a complaint and a motion for preliminary injunction against the First Catholic Slovak Union of the United States and Canada (hereafter FCSU) and its national officers, in the Common Pleas Court of Cuyahoga County, Ohio. Petitioner sought to enjoin the respondents pendente lite from excluding him as a duly elected

and certified delegate of his branch to the 43rd Convention of the FCSU which was to convene on August 13, 1988. The court denied the motion for a preliminary injunction.

Following unsuccessful appeals within the society, petitioner amended the complaint and demanded a trial by jury. The amended complaint alleged three causes of action: (1) Unlawful expulsion, (2) Outrageous acts and conduct of the respondents and (3) Defamation.

In the prayer of the complaint, petitioner demands, among other relief, "that the court issue a permanent injunction enjoining defendants and those persons acting in concert with them from interfering with and depriving the plaintiff of all rights and privileges of a member, or from otherwise exercising his rights ... secured to him by the laws and Constitutions of Ohio and of the United States."

Respondents filed a motion for summary judgment on all of the petitioner's claims. Petitioner countered the motion with the sworn statements of the complaint, evidentiary materials and a brief in opposition. The Common Pleas Court granted respondents' summary judgment on all of petitioner's claims without disclosing the basis of the ruling (App., p. 29, infra).

Petitioner appealed the trial court's judgment to the Court of Appeals, Eighth District, Cuyahoga County, Ohio, which affirmed the ruling below (App. p.2, infra).

With respect to the constitutional issue in the case, the State Court of Appeals indicated, "In Putka's first issue, he asserts his expulsion as a member of the FCSU was accomplished in violation of the Bylaws and contrary to the controlling laws of the land..." (App., p. 13, infra). "Implicit in the concept of protecting an individual's due process rights, both federal and state,

is that two elements must be met, viz., (1) a right or privilege must be deprived without due process; and, (2) state action must have accomplished the deprivation, i.e., the state must be the actor since private conduct, no matter how unfair, is not subject to scrutiny under due process requirements" (App., p. 13, infra). The appellate court went on to say that since "...plaintiff brought his claim against the FCSU and its fifteen named representatives who heard the charges and ultimately expelled him from membership without any allegation of state action government involvement,...plaintiff's argument that his expulsion was accomplished in violation of the 'controlling laws of the land' is not well taken and is overruled" (App., p. 14, infra).

The appellate court concluded by stating that "[p]laintiff was afforded all the essentials of due process in the proceedings undertaken for his appeal resulting in his

expulsion from the FCSU," (App., p. 20, infra), and declared that "...defendants were entitled to summary judgment since no material issue of fact remains to be litigated regarding plaintiff's due process claim under either the United States Constitution or FCSU laws" (App., p. 20, infra).

The petitioner appealed the decision of the appellate court to the Supreme Court of Ohio pursuant to Article VI, Section 2(B)(3) of the Ohio Constitution. This provision of the state constitution states, pertinent hereto:

> The Supreme Court of Ohio shall have appellate jurisdiction as follows:
>
> > (a) In appeals from the court of appeals as a matter of right in the following:
> >
> > > (iii) Cases involving questions arising under the Constitution of the United States or of this state.

The notice of appeal to the Supreme Court of Ohio stated: "This case involves a

substantial constitutional question and is one [the case on appeal] which did not originate in the Court of Appeals" (App., p. 30, infra).

In addition to the issue of summary judgment and other issues, petitioner confronted the Supreme Court of Ohio with the following issues: (1) whether a fraternal insurance society is above the law or a law unto itself in its relationship with the members; (2) whether a fraternal insurance society may bind a member in advance to renounce or waive his right to appeal to the courts for the redress of wrongs; (3) whether punishment of a member for criticizing the action of the national officers violates the member's right to freedom of speech; and (4) whether such a society may be held liable for defamatory statements published in its newspaper which affects or injures the member in his profession.

STATEMENT OF FACTS

The relevant material facts upon which summary judgment was granted to the respondents may be summarized as follows:

The FCSU exists by virtue of the laws of Ohio. It is a fraternal benefit society (hereafter "fraternal insurance society") organized as an Ohio corporation with a lodge system of branches divided into districts in Ohio and the other states of the United States and provinces of Canada. It operates not for profit but solely for the mutual benefit of its members and their beneficiaries, with provision for the payment of death benefits in accordance with the statutory requirements of the state[1].

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[1] As of December 31, 1990, the FCSU had a total insurance in force of $241,831.158, death certificates in force of 87,093, and total assets of $73,932,907. The Society has no social members. It has 504 lodges. 1990 Statistics of Fraternal Benefit Societies, 1991 Edition, published by The National Fraternal Congress of America, Naperville, Illinois.

The FCSU is regulated, investigated and supervised in detail by Chapter 3921 of the Revised Code of Ohio, which includes the public acts of Ohio on the subject. Section 3921.01 defines a fraternal insurance society as "an incorporated society conducted solely for the benefit of its members and their beneficiaries and not for profit, operated on a lodge system...having a representative form of government and which makes provision for the payment of benefits in accordance with Chapter 3921 of the Revised Code."

The statutes provide for the regulation, examination, investigation, and supervision of the Society by the Superintendent of Insurance, and require that any change in the corporate structure or bylaws must be approved by the Superintendent (App., pp. 32-37, infra).

Until the time of the events related herein, petitioner was a member of the

Stephen Furdek District of Cleveland, Ohio (hereafter "District"). He is and was at all times pertinent a member of the Bar of the State of Ohio and a practicing attorney in Cleveland, Ohio.

The respondents are officers and members of the Board of Directors of the FCSU. Respondent Joseph R. Kristofik (hereafter "Kristofik" or "president) is, and was at all times relevant, the President of the FCSU and ex officio president of the Board of Directors (hereafter "Board").

In March of 1986, the Board authorized the formation of a stock holding company for profit, also referred to as the "reorganization plan" (hereafter "Plan"), and approved the expenditure of several million dollars in connection therewith.

The adoption and implementation of the Plan caused concern and vigorous controversy among the members of the FCSU. One group of members that was especially disturbed by the

Plan was the Stephen Furdek District of Cleveland, Ohio. The District felt that the Board had no authority to sanction the organization of a stockholding company for profit, in view of the non-profit nature and scope of the FCSU as a fraternal insurance society, and not before such a radical change in the corporate structure had been submitted for consideration of the Convention -- the highest governing body of the FCSU.

Because of the respondents' persistence in implementing the Plan forthwith, the District decided to challenge the Plan, and therefore, authorized the petitioner to prepare and file a complaint with the Superintendent of Insurance of Ohio and to represent the District as its lawyer in the matter. As a result of the District's com-

plaint to the Superintendent of Insurance[2], the District, of which petitioner was a member, was accused by the President of the FCSU, respondent Kristofik, of failing to appeal to the FCSU before filing the complaint with the Department of Insurance, thereby violating 16.11 of the Bylaws (App., p. 7, infra).

On March 23, 1988, the Board, on charges brought before it by respondent Kristofik, expelled the plaintiff as a member of the FCSU, effective immediately, without giving notice of the charges and of the hearing to

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[2] In the Findings of Facts and Conclusions of Law with regard to the complaint of the District, the Superintendent stated, "Because no general membership convention has been held since the reorganization, there has been no opportunity to address these matters at such convention." The Superintendent of Insurance characterized the District's complaint before him as follows: "The applicant's [District's] request for the information has been made as a part of a good faith attempt to determine the nature of the reorganization plan and as a part of resolving confusion and engaging in legitimate internal debate regarding the reorganization plan."

the petitioner and with no opportunity for the petitioner to appear and to defend against the charges.

Petitioner appealed the Board's ex parte action in punishing him to the Supreme Court of the FCSU, in accordance with the Bylaws, without success.

The Board of Directors is empowered by Section 9.04(e)(f) of the Bylaws to punish a member for the violation of said laws, but only after a "due hearing and trial" (App., p. 38, infra).

Petitioner further appealed the Supreme Court's decision to the August, 1988, Convention of the FCSU pursuant to Section 11.11(c) of the Bylaws. This section grants the Convention the power to "hear and decide all appeals from the decision of the Supreme Court."

At the Convention, the petitioner's appeal was heard by a Committee of five persons selected by the respondent Kris-

tofik, the initiator of the accusation against petitioner. This proceeding was vigorously protested by the petitioner as being invalid, and therefore he did not appear before it.

The Committee decided that the petitioner be expelled from the FCSU. This decision, along with a motion to dismiss petitioner's appeal, was presented by the Committee to the Convention, and was approved by the latter.

Petitioner had been duly elected as a delegate of his Branch to the August, 1988, Convention, but he was not approved as such by the FCSU because of the action taken by the respondents in expelling him from the Society.

The respondent FCSU is the proprietor and publisher of a weekly newspaper entitled "Jednota." It is the official organ of the FCSU in which, all matters of official notice and concern to the members are pub-

lished. The paper is sent to all members and to the other fraternal benefit societies in the United States and Canada.

In the editions of March 23, April 27, and July 6, 1988, of the newspaper, respondent FCSU published reports prepared and submitted by respondent Kristofik, which stated, in essence, that the District had filed a complaint with the State Insurance Department, questioning the validity of the Plan, that respondent Kristofik, as President,"had dissipated Society assets, and was conducting business fraudulently or in a manner hazardous..." to the best interests of the FCSU. The report emphasized that the complaint had been filed by the president and secretary on behalf of the District, with a special note that the petitioner was the attorney for the District in the matter. A report published in several editions of the paper accused the petitioner of acting unethically, and of having "used his posi-

tion as a member of the Bar of the State of Ohio to harass the President and his Board of Directors in violation of the Bylaws... and without due consideration for his responsibilities as a member of the Bar of the State of Ohio," and that, as a consequence, the Board had resolved to file a complaint against the petitioner with the Grievance Committee of the Ohio State Bar Association (App. p. 40-42, infra).

It should be noted, however, that to petitioner's knowledge no complaint had been filed with the Bar Association.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES IMPORTANT FEDERAL CONSTITUTIONAL IMPLICATIONS REGARDING THE PRINCIPLE OF THE LAW OF THE LAND AS FREQUENTLY EXPRESSED BY THE COURTS WITH RESPECT TO ITS APPLICATION IN PROTECTING THE RIGHTS OF MEMBER-POLICYHOLDERS OF A FRATERNAL INSURANCE SOCIETY WHICH HAVE NOT BEEN, AND SHOULD BE, SETTLED BY THIS COURT.

The question whether the constitutional concepts of due process and free speech may

be invoked to protect the rights of a member-policyholder of a fraternal insurance society, is a substantial one; it, therefore, should be treated by this Court.

The Supreme Court of Ohio did not render an opinion in dismissing petitioner's appeal on constitutional grounds. Therefore, references herein are to the opinion of the State Court of Appeals (hereafter "Appellate Court").

STATE ACTION

The FCSU is an Ohio-created private fraternal insurance association. The foundation of the Society is the law of Ohio. It provides the unifying control over the rights and privileges of the members.

The Society is regulated, supervised and controlled in detail by Chapter 3921 of the Ohio Revised Code, and includes public acts of Ohio on the subject. These Ohio statutes are primarily pervasive schemes under which

the State dictates and constantly supervises virtually every important aspect of the Society's affairs, and exercises dominant control in a far-reaching manner.

In the present case, the State was heavily involved in the respondents' reorganization plan to create a stock-holding company for profit, which is the genesis of the instant controversy between the parties. The implementation of the Plan by the respondents required the approval of the Superintendent of Insurance. The State's authority to approve or reject the Plan provoked the concern and interest of the District and was the sole motivation for the filing of the complaint with the Superintendent of Insurance. It was only because the District resorted to and invoked the protection of the State regarding the Plan -- a right secured to the members by the State -- and the petitioner's role in presenting the

complaint to the Superintendent, that he was severely punished by the Society.

The central inquiry as to state action is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a reasonable conclusion of state involvement.

In Lugar v. Edmondson Oil Co., 457 U.S. 937, this Court declared that deprivation must be caused by the exercise of some right or privilege created by the State or by a person for whom the State is responsible.

In Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974), this Court stated the issue of state action as follows:

> [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself.

Under the factual record of the present case, the District, as a member branch of the FCSU, had a right granted to it by the laws of Ohio governing fraternal insurance societies, to complain directly to the Superintendent of Insurance about the reorganization plan submitted by the respondents for his approval. As a direct result of the District's lawful complaint to the Superintendent of Insurance, the District's member and attorney in the matter - petitioner herein - was expelled from the Society by the respondents and thereby deprived of his membership in the FCSU.

Petitioner believes it is beyond dispute that the interaction between the petitioner, the respondents and the State Insurance Department relative to the challenged Plan brought about the deprivation of petitioner's rights in the FCSU.

The respondents' action in seeking state approval of the reorganization plan, the

State's ultimate responsibility regarding the Plan, and the District's complaint to the State about the Plan, resulting in the petitioner's expulsion from the FCSU, are sufficiently intertwined and closely connected "so that the action of the latter may fairly be treated as that of the State itself."

Justice Stevens, writing for the Court in National Collegiate Athletic Association v. Tarkanian (1988), 109 S.Ct. 454, posited the question applicable to the factual record of the present case, as follows:

> In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat the decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct.

In the instant matter, the respondents "took the decisive step [unlawful punishment of the petitioner] that caused harm to the plaintiff [petitioner]," in a situation in

which "the State created the legal framework governing the conduct" [the statutes requiring state approval for the reorganization plan and the District's rightful challenge of the Plan directed to the Superintendent of Insurance]. It is, therefore, reasonable to conclude from such a factual situation that the State was sufficiently involved to treat the decisive conduct as state action.

The court found that petitioner violated the Bylaws by filing the complaint with the Insurance Department without first exhausting the internal remedies of the society, and that such violation was punishable by expulsion from membership. The court held that the action taken against petitioner by respondents was justified under Section 16.11 of the Bylaws.

The finding of the appellate court with respect to the basis for the petitioner's expulsion is erroneous on two counts. First, the decision to complain to the Insurance

Department about the Plan submitted by the national officers was taken by the District branch and was not the unilateral action of the petitioner. True, petitioner filed the District's complaint and pursued it with the Insurance Department. But petitioner did so as the attorney for the District and not pro se. There is no support whatsoever in the record that the petitioner acted ex parte in the matter.

It must be emphasized that the respondents singled out the petitioner, along with the president and secretary of the District, for punishment, despite the fact that the decision to complain to the Insurance Department had been made by the membership of the District.

Second, the complaint that the District branch filed with the Insurance Department was not in the nature of "an action or complaint" that is filed in "any civil court" as contemplated by the Bylaw. Quite clearly,

the District had a right to complain directly to the Insurance Department about the Reorganization Plan submitted for approval by the respondents. Since state law required that such a drastic undertaking as the Plan must be approved by the Insurance Department, it is logical that all interested parties should be heard by the state agency concerning such a critical matter. With reference to the propriety of the District's challenge to the Plan the Superintendent of Insurance stated, "Because no general convention has been held since the reorganization, there has been no opportunity to address these matters at such convention." The Superintendent continued, "The applicant's [District's] request for information has been made as a part of a good faith attempt to determine the nature of the reorganization plan and as a part of resolving the confusion and engaging in legitimate internal debate regarding the reorganization plan."

The fallacy of the court's finding is further illustrated by respondent Kristofik's letter to the Superintendent of Insurance assuring him that the right of members to complain to the Ohio Department of Insurance is inviolate.

Thus, we see that the petitioner was deprived of his rights and privileges without having committed any proscribed act or having violated any law, either of the FCSU Bylaws or of the state. It is abundantly clear from the record that petitioner incurred the wrath of the respondents because he represented the District in its complaint to the Insurance Department, challenging the validity of the Plan.

Although petitioner believes that Section 16.11 is inapplicable as a legal basis for the petitioner's expulsion, there is a related issue of grave public policy, to wit, whether a fraternal insurance society may bind a member in advance to renounce or waive

his right to appeal to the courts for redress of wrongs by reason of a provision in the society's laws.

The landmark case in Ohio on this issue is Meyers v. Jenkins, 63 Ohio St. 101, wherein the Supreme Court of Ohio enunciated the public policy basis for the invalidity of Section 16.11 of the FCSU Bylaws. At pages 120-121, the court declared:

> ...[A] party cannot bind himself by contract in advance to renounce his right to appeal to the courts for the redress of wrongs. If this could be done an association might be formed in the state which would renounce our constitution and laws, and set up a different system of government for themselves, and in case of wrongs and oppression they would be debarred from resorting to our courts, and would be compelled to submit to the decisions of their own tribunals, and would most likely become dissatisfied and disorderly, resulting in riot and bloodshed. The whole state has an interest that the rights of all should be protected and enforced according to the course of jurisprudence it has provided; and for that reason its courts are always open for the redress of wrongs, and no person can by contract in advance, deprive himself of the right to appeal to them.

In the case of Baltimore & Ohio Rr. Co. v. Stankart, 56 Ohio St. 224, the court declared at page 232:

> Courts are created by virtue of the Constitution, and inhere in our body politic as a necessary part of our system of government, and it is not competent for any one, by contract, or otherwise, to deprive himself of their protection. (Underscoring supplied.)

The author of American Jurisprudence 2d, Volume 26, Section 52, states, as follows:

> The courts in this holding proceed upon the theory that it is not competent for a person, in advance of any dispute, to oust the jurisdiction of the courts by providing that the decision of certain individuals named in the contract shall be final and conclusive. It has also been pointed out that a provision of this kind [Section 16.11 of F.C.S.U. Bylaws] is inequitable and invalid since its effect is to leave the arbitration of the controversy to one of the interested parties to the contract. (Underscoring supplied.)

The petitioner, as a long-time member and officer of the FCSU and, especially as a lawyer well versed in the intricacies of

the Plan, was the appropriate person to file and handle the complaint challenging the respondents' attempt to restructure the Society. The concern about the Plan's validity was a critical one, in several respects. One, the Plan involved the formation of a "holding company" for profit, and the investment of huge sums of the Society's money, contrary to the fundamental character of the body - a non-profit organization. Second, the right to discuss the merits and validity of the Plan, openly and freely, had never been afforded the members. The Superintendent of Insurance recognized the importance of this right in his statement that there had been no opportunity to address these matters by the membership because no membership meeting of the Convention had taken place since the reorganization plan had been created.

Petitioner was singled out because of his courage and advice, and his resistance to what appeared to him as oppressive and illegal conduct. The respondents, in their control of the FCSU, refused to grant either recognition or tolerance to parties of differing opinions, such as those of the petitioner and members of his District. No authority is needed for the proposition that the respondents' actions against the petitioner are repugnant to our system of jurisprudence. Our law does not countenance any action which interferes or may interfere with the function of a lawyer, or that seeks to intimidate him in the pursuit of his duties.

The appellate court's rationale in placing its imprimatur on the respondents' unlawful acts and conduct is enigmatic, to say the least. The court completely disregarded the crucial issue and crux of the case as presented by petitioner, to wit:

That petitioner was expelled without the benefit of a "hearing or trial". The record is totally devoid of any mention or consideration of that issue by the court. It concentrated entirely on the appeal process within the Society, and based its decision solely on the fact that the petitioner had been afforded the right to appeal to other forums of the Society. The court stated:

> Plaintiff clearly was afforded all the essentials of due process in the proceedings undertaken for his appeal resulting in his expulsion.... The appeals process was conducted in strict adherence to the facial provisions of the FCSU Bylaws at Section 16. Plaintiff failed to produce any evidence of mistake, fraud or management activity in excess of corporate powers; hence Ohio law requires the decision of the Convention, the ultimate body of the FCSU, be accepted by the court in the case sub judice.

In effect, the court of appeals has ruled that, since the petitioner had been afforded appellate proceedings within the

FCSU, and had exhausted such process, the rulings of the FCSU are "final and must be accepted by courts of law." The rule that emerges from such a decision is that once a member has exhausted the internal remedies of the association, he has no further right to resort to a court for judicial review, irrespective of the merits of his complaint. This is wholly untenable as a matter of law.

Petitioner believes that the appellate court confused trial procedure and its scope and purpose with the nomenclature of appellate review.

The appellate court found untenable the petitioner's contention that his expulsion had been accomplished in violation of the controlling laws of our land. The judgment of the court, in upholding the ex parte finding of guilt and the imposition of punishment by the Board of Directors, rejected the well established decisional

law requiring that there must be charges which justify the punishment, and the accused must have notice of the charges and a fair trial upon the charges before an impartial tribunal.

In the instant case, it had been fully proven that the petitioner was not only denied a trial or hearing upon charges which resulted in the punishment, but that the ex parte hearing, whereby petitioner was expelled, was not conducted by an impartial body. The party who brought the charges before the Board, respondent Kristofik, was also the President of the Board; and the other respondents, who were members of the Board and the same persons who had been accused of wrongdoing in the reorganization plan, constituted the "trial board" that heard and ruled on the expulsion of the petitioner from the Society. Thus, those who had been accused of

wrongdoing, sat in judgment on the complainant.

In a similar situation in which members of a fraternal association accused the national officers of unlawful conduct, an Ohio court made the following observation:

> To permit the officers themselves, whose conduct was assailed, to try and expel members on such charges, would, at least in the absence of clearest authority and full showing of right, violate the plainest principles of justice. (State ex rel. Fritter v. Fraternal Mystic Circle, 9 C.C. 364.)

The courts have uniformly expressed the controlling rule in the following manner, to wit: "The law ensures to every member of such an association a fair trial, not only in accordance with the constitution and bylaws of the association, but also with the demands of fair play, which in the final analysis is the spirit of the law of the land"; "such member must

have a reasonable opportunity to be heard and defend against charges preferred against him, without which opportunity any expulsion would be void."

The petitioner did not and does not claim that the FCSU does not, and should not, have the authority to discipline its members. Instead, the contention was and is strongly made that before punishment is meted out, there must be charges which justify the punishment, and the accused must have notice of the charges and a fair trial upon those charges before an impartial tribunal. This is the gravamen of petitioner's claim. In striking down the wrongful actions of voluntary associations, the courts have invoked due process concepts to protect the rights of the aggrieved member. The courts have expressed the concept in different ways. Some have declared that the punishment must be in accordance with the "demands of fair play,

which in the last analysis is the spirit of the law of the land," Bricklayers', Plasterers' and Stone Masons' Union v. Bower, 183 NYS 855; and "must not violate the plainest principles of justice," State ex rel Fritter v. Fraternal Mystic Circle, (Ohio), 9 C.C. 364.

In commenting upon the unlawful conduct of the national leadership analogous to the actions taken by the respondents, the court in Yokel v. German American Bund (1940), 20 NYS 2d 273, opined:

> It is contrary to the law of the land and the safeguards guaranteed to every member by the United States Constitution. While such authoritarian practices in certain places are now a matter of common knowledge, they may not be permitted to affect this plaintiff's right of membership as measured by constitutional provision and our system of jurisprudence.

The author of 4 American Jurisprudence 466, 472, section 17, stated that "the decisions of any kind of voluntary society

or association in disciplining, suspending, or expelling members" are scrutinized to determine, among other things, "whether or not there was anything in the proceeding in violation of the laws of the land." (Underscoring added.)

The Ohio court in Armstrong v. Duffy, 90 Ohio App. 233, 251, in a case involving the validity of certain punitive actions of the national officers of a labor union against dissenting members, stated the limitations upon the power of such associations to punish, as follows:

> Under our system of jurisprudence, the courts are open to all citizens, and no person shall be deprived of life, liberty or property without due process of law and any provision of any organization restricting its members from pursuing their rights must be strictly construed.
>
> (The court went on to cite Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 16, Article 1 of the Ohio Constitution [App., p. 31, infra].)

The court continued:

> The foregoing provisions of the federal and state constitutions insure the right of every citizen of this state to seek remedy by court action for injuries done to him in his person or property and entitle him to have justice administered according to law without denial or delay, and any person who attempts to interfere unlawfully with this right is guilty of a violation of the fundamental principles guaranteed by the constitutional provisions.

There are a great number of decided cases dealing with the principle of "the law of the land." In 16C C.J.S. 495, Constitutional Law, it is said that "law of the land" is synonymous with "due process of law."

This presents the question whether the principle "law of the land" implicates the protections of the First and Fourteenth Amendments under the factual situation of the within controversy. The Fourteenth Amendment "was intended to preserve and protect rights long recognized under the

common law." Butler v. Perry (1916), 240 U.S. 328, 333.

It is undisputed that the petitioner was punished by expulsion from membership in the FCSU because of the District's complaint to the Ohio Department of Insurance. It is important in this respect to recall the Superintendent's statement concerning the complaint, to wit: "the request for information" sought by the complaint was made in "good faith," and "...as part...[of] engaging in legitimate internal debate regarding the reorganization plan."

The Superintendent quite properly recognized that in the final analysis petitioner, as a member of the District, and others, were merely exercising their right of free speech.

Did the respondents' punishment of the petitioner violate his right to freedom of speech? Stated otherwise, is the petitioner entitled to the protection of the First

Amendment to the Constitution of the United States under the factual circumstances of this case?

Petitioner believes that the public policy considerations of "due process of law" and "free speech" principles involved herein justify the grant of certiorari to review the judgment below.

A STATE MAY NOT, CONSISTENT WITH THE FOURTEENTH AMENDMENT, ENFORCE A DECISION OF A FRATERNAL INSURANCE SOCIETY EXPELLING A MEMBER-POLICYHOLDER WHO WAS NOT ACCORDED THE REMEDIES OF THE LAW OF THE LAND TO PROTECT HIS RIGHTS.

It is an elementary precept in our concept of the law that a human being has an inherent right to due process of law, 16C C.J.S., Constitutional Law, Section 949.

The evidence is unrefuted that the petitioner was falsely charged and unlawfully punished without having been accorded all the existing remedies provided by the law for the protection of his rights. Clearly,

such proceedings are a complete nullity. Yet, the state court placed its imprimatur on such unlawful action.

This Court has had occasion to consider the constitutional consequences of such state action in Postal Telegraph Cable Co. v. Newport (1918), 247 U.S. 464, and Brinkerhoff-Faris v. Hill (1930), 281 U.S. 673.

Hill involved a suit in equity to enjoin the collection of a state tax. During the period preceding plaintiff's action, the state supreme court had ruled that the state tax commission did not have the powers and duties conferred upon it. This decision had been followed by the supreme court itself in cases after that ruling and had been adhered to by the tax commission. In the plaintiff's case before the supreme court, the latter expressly overruled its earlier decision regarding the authority of the tax commission. The possibility of relief before the tax commission had not been known

by anyone until the supreme court had filed its opinion in the plaintiff's equitable suit. By then, it was too late for the plaintiff to resort to the newly found remedy -- the tax commission.

In Hill, this Court found that the state supreme court's refusal to hear plaintiff's equitable suit and to grant the relief requested, not because of any lack of power or of any demerit in the complaint, but because plaintiff had not sought an administrative remedy which, in fact, had never been available and was not presently open to him at the time of his equitable suit, deprived plaintiff of a remedy. This Court concluded that since plaintiff was denied the only remedy ever available for the enforcement of its right to prevent the seizure of his property due to the tax assessment, the judgment deprived the plaintiff of his property. Thus, the Court found, the

transgression of the Due Process Clause of the Fourteenth Amendment was obvious.

This Court's observation in Hill is especially enlightening regarding the constitutional issue herein. The Court stated at page 682:

> ...[While] it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in doing so, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

In Hill, this Court declared: "We are of the opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff due process of law - using that term in its primary sense of an opportunity to be heard and to defend its substantive right."

The State court in the Newport case enforced a judgment against the complaining

party on the basis of res judicata, although the complainant was neither a party nor in privity with a party therein. The court stated as follows:

> The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction (citation omitted). The opportunity to be heard is an essential requisite of due process of law in judicial proceedings (citations omitted). And, as a State may not, consistent with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (citations omitted), so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

With regard to the question whether state law, in the case, is independent of the federal questions, the Court declared:

> Waiving the doubt whether under the particular facts of this case, the question of res judicata can be regarded as independent of the federal questions

> that were raised, we are of the opinion that the decision reached upon it is so clearly ill founded that it cannot sustain the judgment, and for this reason it is inconsistent with another federal right of defendant, fundamental in character. (Emphasis supplied.)

The aforementioned holding can be applied with equal force to the instant case, to wit: the decision of the respondents expelling petitioner "is so ill-founded that it cannot sustain the state court judgment, and it is for this reason that it is inconsistent with another federal right of the [petitioner], fundamental in character."

In petitioner's case, the State court disregarded the requirement of due process in the proceedings pursued by the respondents against the petitioner, and gave conclusive effect to their unlawful actions. According to the rationale of and ruling in Hill and Newport, supra, the State court judgment is constitutionally void.

DEFAMATION

The newspaper involved in the instant cause is the official organ of the FCSU and it is used primarily for the publication of official reports and proceedings of the Society and to inform members about other matters of mutual concern.

In the several reports published about the controversy in the FCSU newspaper, it was stated that the District's complaint to the Insurance Department was an "unethical attempt to discredit the Society in the fraternal insurance system, and with the Ohio Department of Insurance." The publication further stated that the petitioner used his position "as a member of the Bar of the State of Ohio" to harass the President and Board of Directors in violation of the By-laws of the FCSU and in disregard of petitioner's "responsibilities as a member of the Bar of the State of Ohio." In this connection, it was also reported that the

Board of Directors had determined "to file...a formal complaint before the Grievance Committee of the Ohio State Bar Association protesting the improprietary (sic) of the actions of and the harassment of the President and this Board of Directors of the First Catholic Slovak Union by attorney Andrew C. Putka."

To the unsophisticated reader, such statements may reasonably be interpreted to mean that the petitioner is a "shyster lawyer." The American College Dictionary defines "shyster" as: "A lawyer who uses unprofessional or questionable methods." Webster's New Twentieth Century Dictionary, Unabridged, Second Edition, states: "a person, especially a lawyer, who uses unethical or tricky methods" -- certainly, an odious and disreputable characterization attributed to the petitioner by the challenged publication. Undoubtedly, such

defamatory statements could have dire consequences for a lawyer.

The factual record shows unequivocally and emphatically that the petitioner was expelled from the FCSU because he had acted as the attorney for the District in its complaint to the Insurance Department, and that petitioner had not violated any law in such representation. Indeed, his professional acts cannot be viewed as "unethical" or as conduct in disregard of petitioner's "responsibilities as a member of the Bar of the State of Ohio" by any stretch of the imagination.

The unrefuted evidence that the petitioner was falsely charged and unlawfully punished, and therefore not guilty of any wrongdoing, compels the determination that the defamatory statements were published "with actual malice," that is, "with knowledge the statements were false, or in reckless disregard of the truth."

The respondents could have informed the members about the controversy with the District regarding the Plan, properly and adequately, without publishing the defamatory statements used by them. In so doing, the respondents have forfeited any protection they may have had in the matter.

The State Court of Appeals held that the respondents were entitled to assert the defense of qualified privilege to the defamatory statements of the publication, "since plaintiff failed to allege actual malice" as required by New York Times Co. v. Sullivan (1964), 376 U.S. 254, which was cited in the Ohio case of Perez v. Scripps Howard Broadcasting Co. (1988), 35 Ohio St. 3d, 215, 218, and was invoked by the appellate court to support its decision.

The question which arises in this connection is whether the facts of the present case are wholly within the First Amendment concerns expressed by this Court in New York

Times Co. and its progeny. Stated otherwise, is the FCSU publication the type of media worthy of First Amendment protection as contemplated by the decisions of this Court?

Certain it is that the defamatory statements in the present case do not involve a public official or a public figure or a matter of public concern. It is speech on "matters of public concern" that is "at the heart of the First Amendment's protection," First National Bank of Boston v. Bellotti, 435 U.S. 765.

Absent the involvement of a "public official," or a "public figure," or a "private figure-public issue matter," presumed and punitive damages for false and defamatory statements are not prohibited by the First Amendment. This Court has long recognized that the State has a strong and legitimate interest in compensating private individuals for injury to reputation.

Gertz v. Robert Welch, Inc. (1974), 418 U.S. 323; Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., (1985), 472 U.S. 763, 105 S. Ct., 2639.

In any event, it is not realistic to claim that the respondents' interests warrant special protection, since the published statements about the petitioner are per se wholly false and clearly damaging to the petitioner's profession.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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91-1448

No.

Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ANDREW C. PUTKA,

Petitioner,

vs.

FIRST CATHOLIC SLOVAK UNION OF THE UNITED STATES OF AMERICA AND CANADA, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

APPENDIX

JOHN R. VINTILLA
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(216) 331-7979
Attorney for Petitioner

TABLE OF CONTENTS

	Pages
Appendix A - Judgment Entry, Supreme Court of Ohio.....	1
Appendix B - Journal Entry and Opinion, Court of Appeals, Cuyahoga County, Ohio.....	2
Appendix C - Judgment Entry, Common Pleas Court of Cuyahoga County, Ohio.....	29
Appendix D - Notice of Appeal to Supreme Court of Ohio.....	30
Appendix E - Article I, Section 16, Ohio Constitution.....	31
Appendix F - Excerpts, Revised Code of Ohio.....	32
Appendix G - Excerpts, Bylaws of the First Catholic Slovak Union.....	38
Appendix H - Excerpts of Reports in F.C.S.U. Newspaper, ...	40

APPENDIX A.

THE SUPREME COURT OF OHIO

1991 Term

Andrew C. Putka, Appellant,	:	To wit: December 11, 1991
v.	:	Case No. 91-1917
First Catholic Slovak Union etc., et al., Appellees.	:	E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

(Court of Appeals No. 59101)

/s/ Thomas J. Moyer
Chief Justice

APPENDIX B.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 59101

ANDREW C. PUTKA, Plaintiff,	)	
v.	)	JOURNAL ENTRY AND OPINION
FIRST CATHOLIC SLOVAK UNION, ETC., ET AL., Defendants.	)	

DATE OF ANNOUNCEMENT OF DECISION: AUGUST 15, 1991

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court No. 153,196

JUDGMENT: AFFIRMED.

KRUPANSKY, C.J.:

Plaintiff Andrew Putka filed an amended complaint December 1, 1988 in Cuyahoga County Court of Common Pleas Case No. 153196 against defendants First Catholic Slovak Union of the United States and Canada (hereinafter "FCSU") and fifteen individuals holding various positions with the fraternal

organization, alleging defendants collectively:

(1) maliciously conspired to expel plaintiff from their organization in violation of his rights;

(2) engaged in extreme and outrageous conduct, causing plaintiff "anxiety, insult, embarrassment and humiliation";

(3) published in the FCSU weekly publication "Jednota" a malicious, false and defamatory report, causing plaintiff to be held up to scorn and ridicule in his community and injuring his professional reputation.

Plaintiff sought relief requesting an injunction, compensatory and punitive damages. The trial court denied injunctive relief. Thereafter, plaintiff appealed to this court from the denial of his request for injunctive relief in Case No. CA56199. This appeal was subsequently dismissed on defendants' motion without objection by

plaintiff. Defendants then made a joint motion for summary judgment in the trial court October 6, 1989, which was granted by the trial court as to all claims on December 12, 1989.

The relevant facts follow:

Plaintiff was an active member and often held elected office in the FCSU, a fraternal organization organized to promote the spiritual and temporal welfare of its members, who share a common religious and ethnic heritage.

The FCSU offers many services, including providing "death and disability benefits" and assisting the "indigent, aged, sick and disabled members." (See FCSU Bylaws, Section 2.) The FCSU is a non-profit organization incorporated in Ohio and has a Charter and Bylaws governing grievance procedures that members agree to obey.

In 1986, the Board of Directors of the FCSU began a corporate reorganization plan

to create a holding company and three subsidiaries for its Jednota Printing Co. The Board created this plan since the printing company had the potential of generating significant income which the Board felt could threaten the FCSU's tax-exempt status. This reorganization plan generated a controversy and was opposed by the Cleveland District (also called the Reverend Stephen Furdek District). It is undisputed that on or about May 12, 1987, plaintiff filed a formal complaint with the Ohio Department of Insurance, alleging certain conflicts of interest and fraudulent conduct and questioning the general reorganization plan. Plaintiff alleged to the investigative agency, among other things, that the plan was effected without membership approval.

The Ohio Department of Insurance, after a thorough investigation, issued a report on December 15, 1987, stating in its conclusion as follows:

Conclusion

Each of the issues raised by the complainants involved interpretations of the fraternal's constitution and by-laws. Those documents also outline a procedure that members may use to submit such interpretative matters for resolution by the fraternal. In this case, the complainants didn't follow the procedures mandated by these basic organization documents.

Neither the evidence presented by the complainants, nor the evidence developed in the Department's investigation warrants proceeding with a show cause hearing pursuant to Ohio Revised Code Section 3921.26.

Additionally, I have no uncertainty that the fraternal presented the reorganization to the Department for consideration during its planning stages in 1986. At that time, sufficient disclosures were made for the Department to consider the matter. At that time, the Department concluded that the matter was an issue controlled by the investment law provision of Ohio Revised Code Section 3907.14 and approved the matters as proper investments for the fraternal. Nothing in this investigation warrants reconsideration of the determinations made by the Department under that section.

The Board of Directors of the FCSU issued a formal complaint, in a letter dated February 19, 1988, against plaintiff and

others at the Cleveland District informing them of their infractions of specific Bylaws and that disciplinary action would be taken.

Subsequently, on March 23, 1988, the Board of Directors met and unanimously voted to expel plaintiff from membership in the FCSU.

Plaintiff admitted in deposition taken by defendants that he failed to bring his complaints regarding FCSU corporate reorganization to the FCSU before filing his complaint with the Ohio Insurance Commission as required by Sections 4.07 and 16.11 of the FCSU Bylaws, which follow:

> 4.07 LOSS OF MEMBERSHIP
>
> A member or branch may forfeit right to membership by failure to pay dues, fines, assessments or failure to comply with the Constitution, Bylaws or rules and regulations as established.
>
> 16.11 ACTION AT LAW IN CIVIL COURT
>
> No action at law or complaint shall be filed or entered in any civil court on the part of a member against the F.C.S.U. without first exhausting the privileges of trial and appeal in the

> various forums of the F.C.S.U. The bringing of any such action by a member will be considered a breach of the Bylaws punishable by fine or expulsion, either or both in the discretion of the Board of Directors. This section shall cover all complaints which members may have against the officers of the F.C.S.U. or against the F.C.S.U.

Plaintiff appealed his expulsion to the Supreme Court of the FCSU, a remedy provided by the Bylaws. His expulsion was reduced to a one-year suspension from membership.

Thereafter, plaintiff appealed the decision of the Supreme Court of the FCSU to the Convention of the FCSU, which is the "supreme legislative power and judicial tribunal in the FCSU." (Bylaws, Section 11.01.) A grievance committee was appointed by the Convention. Plaintiff refused to attend any sessions although requested by letter dated August 9, 1988 to do so. The Convention voted and recommended plaintiff's expulsion be reinstated in August, 1988.

Thereafter, in several editions of "Jednota," the FCSU's official newspaper,

plaintiff's expulsion as well as that of others involved in filing the complaint to the Ohio Department of Insurance was reported.

From summary judgment granted by the trial court for all defendants, plaintiff timely appeals. Plaintiff sets forth two assignments of error as follows:

I. THE TRIAL COURT ENTERED SUMMARY JUDGMENT FOR THE DEFENDANTS ON ALL THE PLAINTIFF'S CLAIMS IN VIOLATION OF THE SCOPE AND PURPOSE OF RULE 56 OF THE OHIO RULES OF CIVIL PROCEDURE.

II. THE TRIAL COURT'S JUDGMENT IS CONTRARY TO LAW.

Plaintiff's two assignments of error lack merit.

Plaintiff's brief separately argues the following three issues; viz, (1) his expulsion from membership in the FCSU; (2) the conspiracy to violate his rights by the FCSU's "outrageous acts"; and (3) his defamation through the publication reporting

plaintiff's expulsion in the FCSU's newspaper, "Jednota."

EXPULSION FROM MEMBERSHIP

Plaintiff argues his expulsion by the FCSU was unlawful and deprived him of his property rights, setting forth the following separate issues:

> THE UNLAWFUL EXPULSION OF THE PLAINTIFF FROM MEMBERSHIP IN THE F.C.S.U. DEPRIVED HIM OF THE RIGHT TO PARTICIPATE AS A DELEGATE TO THE 43RD CONVENTION OF THE F.C.S.U. AND OF HIS PROPERTY RIGHTS AS A MEMBER OF THE SOCIETY.
>
> A FRATERNAL ORGANIZATION MAY NOT BIND A MEMBER IN ADVANCE TO RENOUNCE HIS RIGHT TO APPEAL TO THE COURTS FOR THE REDRESS OF WRONGS.
>
> THE PUNISHMENT OF THE PLAINTIFF BECAUSE OF HIS ROLE IN THE COMPLAINT TO THE SUPERINTENDENT OF INSURANCE, IS IRREGULAR AND INVALID.
>
> WHERE A MEMBER OF A FRATERNAL SOCIETY IS PUNISHED BECAUSE OF HIS CRITICISM OF THE ACTIONS AND CONDUCT OF THE OFFICERS OF THE SOCIETY, SUCH PUNISHMENT IS IN CONFLICT WITH THE FREE SPEECH PROVISION OF THE CONSTITUTION OF THE UNITED STATES AND OF THE STATE OF OHIO; THEREFORE, A COURT OF EQUITY WILL GRANT THE APPROPRIATE RELIEF.

> THE PUNISHMENT VISITED UPON THE PLAINTIFF BY THE F.C.S.U. WAS SO HARSH AS TO BE CONFISCATORY OF HIS RIGHTS AS A MEMBER OF THE BRANCH AND DISTRICT OF THE F.C.S.U.
>
> A MEMBER OF A FRATERNAL BENEFIT SOCIETY IS NOT BOUND BY INVALID LAWS OR ARBITRARY PROCEEDINGS OR DECISIONS OF THE OFFICERS ON FORUMS OF THE SOCIETY. THE PRINCIPAL OF MUTUALITY OF OBLIGATIONS REQUIRES BOTH PARTIES TO A COMPACT (BY-LAWS) TO ABIDE IT. FAILURE OF ONE PARTY TO DO SO, RELIEVES THE OTHER OF HIS OBLIGATIONS THEREUNDER.

Plaintiff's arguments are unpersuasive.

A court reviewing the granting of a summary judgment must follow the standards set forth in Civ. R. 56(C), which specifically provide before summary judgment be granted, the following must be determined:

> *** No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion and, viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., (1977), 50 Ohio St. 2d 317, 327.

It is axiomatic that in deciding whether the trial court correctly granted summary judgment, the court sub judice must follow Civ. R. 56 and "look at the record in the light most favorable to the party opposing the motion ***." Campbell v. Hospitality Motor Inns, Inc. (1986), 24 Ohio St. 3d 54, 58.

The party seeking summary judgment, defendants in this case, bears the burden of showing no genuine issue of material fact exists for trial. Harless v. Willis Day Warehousing (1978), 54 Ohio St. 2d 64, 66. The inferences to be drawn from the underlying facts contained in the depositions, affidavit and other evidentiary materials must be construed in the opposing party's favor, i.e., plaintiff Putka; thus, summary judgment must be denied if reasonable minds could find for the party opposing the motion, Putka in this case. Kunkler v. Goodyear Tire & Rubber Co. (1988), 36 Ohio St.

3d 135, 136, citing Hounshell v. American States Ins. Co. (1981), 67 Ohio St. 2d 427, 437.

In plaintiff Putka's first issue, he asserts his "expulsion as a member of the FCSU was accomplished in violation of the Bylaws and contrary to the controlling laws of our land."

In essence, plaintiff argues he had a property right in seeking elected office and was deprived of that right.

Implicit in the concept of protecting an individual's due process rights, both federal and state, is that two elements must be met, viz., (1) a right or privilege must be deprived without due process; and (2) state action must have accomplished the deprivation, i.e., the state must be the actor since private conduct, no matter how unfair, is not subject to scrutiny under due process requirements. National Collegiate Athletic

Ass'n. v. Tarkanian (1988), 109 S.Ct. 454, 461, citing Shelley v. Kraemer (1948), 334 U.S. 1, 13; Gotsis v. Lorain Community Hospital (1974), 46 Ohio App. 2d 8, 15.

Plaintiff has failed to establish (1) that he had a property right in his continuing membership and possible future election to office as a delegate in the FCSU or (2) that his dismissal involved any state action whatsoever. See, Cleveland Board of Education v. Loudermill (1985), 470 U.S. 532 (holding a tenured state employee has a property right to continued employment and must be accorded due process before serious disciplinary sanctions). To the contrary, plaintiff brought his claim against the FCSU and its fifteen named representatives who heard the charges and ultimately expelled him from membership without any allegation of state action government involvement. Therefore, plaintiff's argument that his expulsion was accomplished in violation of

the "controlling laws of our land" is not well taken and is overruled.

Plaintiff next contends the FCSU violated the due process rights afforded to plaintiff as a member by the FCSU Bylaws in the following ways:

(1) by failing to provide notice of charges against him as required by Section 16.03 of the Bylaws "at least fifteen days in advance of the hearing";

(2) by punishing plaintiff by expulsion, which was too arbitrary, unlawful and harsh;

(3) by punishing plaintiff for exercising his rights of free speech; and

(4) by failing to recognize plaintiff was neither required nor limited to pursuing the remedies for redress of grievances as set forth in the FCSU Bylaws.

Generally speaking, in matters of policy, discipline or internal economy of a voluntary association, wherein the members have mutually agreed upon a charter or rules, the decision of the association itself is supreme. See, generally, 60 Ohio Jurisprudence 3d, Insurance, Section 1555. In the absence of mistake, fraud or management activity in excess of its corporate powers, a decision by such association in accord with its own charter and rules made by the governing body must be accepted by courts of law. State, ex rel. Ohio High School Athletic Ass'n. v. Judges of the Court of Common Pleas of Stark County (1962), 173 Ohio St. 239, 248; see, also, Normali v. Cleveland Ass'n. of Life Underwriters (1974), 39 Ohio App. 2d 25, 28.

In the case sub judice, plaintiff first complains he was denied due process under the Bylaws of the FCSU because he was not notified of the charges against him pursuant

to Section 16.03(a), Trials, which states as follows:

> (a) When charges are preferred before the Board of Directors, the accused may be notified at least fifteen (15) days in advance of the time and place of the hearing and must receive a written statement of the charge against him (her).

The FCSU Board issued a formal written complaint, naming plaintiff, in a letter to Ferenchak addressed to the Cleveland District of the FCSU February 19, 1988. Plaintiff, as both a member of the District and an attorney, was instrumental in filing the complaint with the Ohio Department of Insurance. Plaintiff, therefore, had constructive notice of his infraction of FCSU Bylaws when he filed the initial complaint in violation of Bylaws Section 16.11. Thereafter, when the Board notified plaintiff's District by letter of charges against plaintiff and others on February 19, 1988, plaintiff had actual notice. The Board held its annual

meeting March 23, 1988. Plaintiff, thus, had more than the fifteen-day notice required by the Bylaws.

Assume arguendo, plaintiff was not sufficiently on notice to appeal to the Board, plaintiff was given ample opportunity to effect his appeal to both the FCSU Supreme Court and the Convention. Plaintiff did not appear before a grievance committee of the Convention, as was requested to present his defense, and plaintiff was subsequently expelled by the Convention. Thus, plaintiff failed to prosecute his own appeal to the full extent allowable and provided for in the Bylaws and cannot now claim prejudice or that his expulsion was arbitrary, unlawful or harsh.

The Bylaws of the FCSU clearly provide that a member's failure to comply with "the Constitution, Bylaws, or rules and regulations" may result in loss of membership. (Bylaws, Section 4.07.)

The FCSU Bylaws provide at Section 16.11 as follows:

> 16.11 ACTION AT LAW IN CIVIL COURT
>
> No action at law or complaint shall be filed or entered in any civil court on the part of a member against the F.C.S.U. without first exhausting the privileges of trial and appeal in the various forums of the F.C.S.U. The bringing of any such action by a member will be considered a breach of the By-laws punishable by fine or expulsion, either or both in the discretion of the Board of Directors. This section shall cover all complaints which members may have against the officers of the F.C.S.U. or against the F.C.S.U.

A clear reading of the Bylaws, with application of the facts in the case sub judice, provides support for the decision of the FCSU Board, Supreme Court and Convention to find plaintiff breached the "Bylaws, punishable by *** expulsion," since plaintiff filed the complaint with the Ohio Insurance Commission without first utilizing and exhausting the internal remedies of trial and appeal provided to the membership.

Plaintiff clearly was afforded all the essentials of due process in the proceedings undertaken for his appeal resulting in his expulsion from the FCSU. (See Normali, supra at 31.)

The appeals process was conducted in strict adherence to the facial provisions of the FCSU Bylaws at Section 16. Plaintiff failed to produce any evidence of mistake, fraud or management activity in excess of corporate powers; hence, Ohio law requires the decision of the Convention, the ultimate governing body of the FCSU, be accepted by the court in the case sub judice.

Construing the defendants' motion for summary judgment in a light most favorable to plaintiff, it appears from the evidence and entire record that reasonable minds can come to but one conclusion; viz., that defendants were entitled to summary judgment since no material issue of fact remains to be litigated regarding plaintiff's due pro-

cess claims under either the United States Constitution or FCSU Bylaws.

CONSPIRACY TO VIOLATE PLAINTIFF'S RIGHTS

Plaintiff appears to argue in this issue that he has a claim for intentional infliction of emotional distress and punitive damages since "conspiracy" is not a recognized tort under Ohio law.

Plaintiff complains of the punishment meted out to him by expulsion from the FCSU as "egregious," "cruel" and "outrageous" conduct which caused him "humiliation, insults, embarrassment and disgrace" as a person and attorney.

The Ohio Supreme Court has stated in Yeager v. Local Union 20 (1983), 6 Ohio St. 3d 369, in syllabus one, that the elements of the tort of intentional infliction of emotional distress follow:

> One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is

> subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

See, also, Russ v. TRW, Inc. (1991), 59 Ohio St. 3d 42; Reamsnyder v. Jaskolski (1984), 10 Ohio St. 3d 150.

In the case sub judice, a review of the record, including plaintiff's own deposition testimony, indicates he can point to no conduct on defendants' part which may be characterized as "extreme" or "outrageous." Furthermore, defendants were acting within their own organizational parameters and Bylaws when moving to expel plaintiff.

Plaintiff's argument claims he has suffered "humiliation, insults, embarrassment and disgrace." None of these complaints is sufficient to rise to the level necessary to constitute the type of physical or serious emotional injury contemplated in the tort of intentional infliction of emotional distress. Yeager, supra. In addi-

tion, plaintiff's deposition indicates he suffered from stress but has seen no psychologist or physician for emotional or physical problems arising from his expulsion from the FCSU. (Depo. 35-36, 38, 42.)

Thus, plaintiff has failed, as a matter of law, to establish a viable claim since he did not meet any of the required elements of the tort of intentional infliction of emotional distress. Yeager, supra.

Accordingly, summary judgment for defendants on this issue was appropriate since plaintiff failed to state a claim for intentional infliction of emotional stress.

DEFAMATION

Plaintiff lastly argues his reputation was defamed based on three articles published in the FCSU weekly newspaper, "Jednota," describing his expulsion.

In order to establish a claim for libel, the following elements must exist:

(1) The statement must be false;

(2) The statement must be defamatory towards the plaintiff;

(3) The statement must be in writing;

(4) The statement must be published; and

(5) The defendant must be proven guilty of some degree of fault.

See, Hahn, v. Kotten (1975), 43 Ohio St. 2d 237, 243; Hersch v. E.W. Scripps Co. (1981), 3 Ohio App. 3d 367, 374.

Plaintiff agrees that "Jednota" may have had a qualified privilege to publish information surrounding his expulsion, but states the statements made therein were false, thus exceeding the privilege. Plaintiff states the reporting of the charges was, in essence, slanted, distorted and unnecessarily "defamatory," but fails to identify what exactly was said that was false or defamed him.

A clear reading of the newspaper editions attached to plaintiff's complaint

contains a factual report of his expulsion in accord with plaintiff's own recitation of the facts. Plaintiff failed to elucidate which part of the publication was false or defamed him. In addition, plaintiff has failed to answer defendants' assertion of qualified privilege.

In Hahn v. Kotten, supra, at 244-246, the court stated as follows:

> Defamatory statements are conditionally privileged if they pertain to or are motivated by the existence of some special relationship such as the family, lawyer-client, doctor-patient, or insurer-insured relationship. It is generally accepted as appropriate and desirable that one will take steps to protect the interests of another with whom he shares such a relationship.
>
> * * *
>
> A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation.

Assume, arguendo, the reporting of plaintiff's expulsion was false and defamatory. In the case sub judice, defendants were entitled to assert the defense of qualified privilege since plaintiff failed to allege actual malice on defendants' part. Id. at 248. "Actual malice" requires publication of a defamatory falsehood "with knowledge that it was false or with reckless disregard of whether it was false or not." Perez v. Scripps-Howard Broadcasting Co. (1988), 35 Ohio St. 3d 215, 218, citing New York Times Co. v. Sullivan (1964), 376 U.S. 254.

Defendants had a duty to report the results of the internal struggle of differing factions within their own organization by virtue of "commonality of interest." See, Creps v. Waltz (1982), 5 Ohio App. 3d 213, 214. The Bylaws actually require the publication of official reports and proceed-

ings of the FCSU Supreme Court. (Sections 4.06, 7.05(g), 7.08(d).)

The FCSU, as a fraternal organization, was qualifiedly privileged to publish the plaintiff's expulsion. Since qualified privilege was appropriate, plaintiff was required to allege and show actual malice in the reporting of his expulsion. The record before us is devoid of any demonstration by plaintiff of either falsity of the reporting or actual malice by the defendant. Hahn, supra, at 248 citing New York Times Co., supra.

Accordingly, construing the facts established in the pleadings, affidavits, depositions, newspapers and other record parts in the light most favorable to plaintiff, reasonable minds may read only one conclusion and that is no evidence existed from which a reasonable jury could find actual malice and thus, defendants were

entitled to summary judgment as a matter of law.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN McMANAMON, J., and

BLACKMON, J., CONCUR

/s/ BLANCHE KRUPANSKY
CHIEF JUSTICE
BLANCHE KRUPANSKY

APPENDIX C.

COURT OF COMMON PLEAS
OF CUYAHOGA COUNTY, OHIO

ANDREW C. PUTKA, Plaintiff,	:	Case No. 153196
vs.	:	(Received for filing December 12, 1989)
F.C.S.U., et al., Defendants.	:	

Defendants' motion for summary judgment filed on October 6, 1989 is hereby GRANTED AS TO ALL CLAIMS.

/s/ William E. Mann
Judge

APPENDIX D.

COURT OF APPEALS, EIGHTH DISTRICT
CUYAHOGA COUNTY

ANDREW C. PUTKA,	:	CASE NO. 59101
Plaintiff-Appellant,	:	NOTICE OF APPEAL
vs.	:	
FIRST CATHOLIC SLOVAK UNION, etc., et al.,	:	
Defendants-Appellees:		

Now comes ANDREW C. PUTKA, plaintiff-appellant herein, and gives notice of appeal to the Supreme Court of Ohio from the judgment entered in the Court of Appeals of Cuyahoga County, Ohio on the 26th day of August, 1991.

This case involves a substantial constitutional question and is one which did not originate in the Court of Appeals.

/s/ John R. Vintilla
Attorney for Plaintiff-Appellant

(Filed September 12, 1991)

APPENDIX E.

Article I, Section 16 of the Ohio Constitution provides as follows:

> All courts shall be open, and every person, for any injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

APPENDIX F.

REVISED CODE OF OHIO

Section 3921.01 Definitions.

Any incorporated society, order, or supreme lodge, without capital stock, including one exempted under the provisions of division (LB) of section 3921 of the Revised Code whether incorporated or not, rated or not, conducted solely for the benefit of its members and their beneficiaries and not for profit, operated on a lodge system with ritualistic form of work, having a representative form of government, and which makes provision for the payment of benefits in accordance with Chapter 3921. of the Revised Code, is hereby declared to be a fraternal benefit society.

Section 3921.03 Representative form of government.

A society is deemed to have a representative form of government when:

(A) It provides in its constitution or laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members of such body as may be prescribed by the society's constitution and laws.

(B) The representatives elected constitute a majority in number and have not less that two-thirds of the votes nor less than the votes required to amend its constitution and laws.

(C) The meetings of the supreme legislative or governing body and the election of officers, representatives, or delegates are held as often as once in four calendar years.

(D) The society has a board charged with the responsibility for managing its affairs in the interim between meetings of its supreme legislative or governing body, subject

to control by such body and having powers and duties delegated to it in the constitution or laws of the society.

(E) Such board is elected by the supreme legislative or governing body, except in case of filling a vacancy in the interim between meetings of such body.

Section 3921.11 Changes of incorporation, constitution, or laws must be filed.

A domestic society may amend its articles of incorporation, constitution, or laws in accordance with their provisions by action of its supreme legislative or governing body at any regular or special meeting or, if its articles of incorporation, constitution, or laws so provide, by referendum. Such referendum may be held in accordance with the provisions of its articles of incorporation, constitution, or laws, by the vote of the voting members of the society, by the vote of delegates or representatives of voting members or by the vote of local lodges or

branches. No amendment submitted for adoption by referendum shall be adopted unless, within six months from the date of submission, a majority of all of the voting members of the society signify their consent to such amendment by one of the methods specified in this section.

Section 3921.26 Investigation by superintendent of insurance; hearing, liquidation of society.

(A) When the superintendent of insurance upon investigation finds that a domestic society:

(1) Has exceeded its powers;

(2) Has failed to comply with any provision of Chapter 3921. of the Revised Code;

(3) Is not fulfilling its contracts in good faith;

(4) Has a membership of less than four hundred after an existence of one year or more;

(5) Is conducting business fraudulently or in a manner hazardous to its members,

creditors, the public, or the business; he shall notify the society of his findings, state in writing the reasons for his dissatisfaction, and require the society to show cause on a date named why it should not be enjoined from carrying on any business until the violation complained of has been corrected, or why an action in quo warranto should not be commenced against the society.

Section 3921.35 Examination of society.

The superintendent of insurance, or any person he may appoint, has the power of visitation and examination into the affairs of any domestic society and he shall make such examination at least once in every three years...The minutes of the proceedings of the supreme legislative or governing body and of the board of directors or corresponding body of a society shall be in the English language. In making any such examination the superintendent of insurance may summon and qualify as witnesses under oath

and examine its officers, agents, and employees or other persons in relation to the affairs, transactions, and condition of the society. A summary of the report of the superintendent of insurance and such recommendations or statements of the superintendent of insurance as may accompany such report, shall be read at the first meeting of the board of directors or corresponding body of the society following the receipt thereof, and if directed so to do by the superintendent of insurance, shall also be read at the first meeting of the supreme legislative or governing body of the society following receipt thereof. A copy of the report, recommendations, and statements of the superintendent of insurance shall be furnished by the society to each member of such board of directors or other governing body.

APPENDIX G.

BYLAWS OF THE FCSU

Section 9.04 Board of Directors

(e) Have jurisdiction to hear and to pass upon all complaints, grievances or violations of the Bylaws and to impose penalty as provided in Section 16 of these Bylaws.

(f) Dismiss from office after due hearing and a trial, any supreme or local officer or a junior elder who fails to perform his (her) duties, or violates any provision of these Bylaws.

Section 11.11 Duties of the Convention

The Convention shall:

(c) Hear and decide all appeals from the decisions of the Supreme Court.

Section 16.03 Trials.

(a) When charges are preferred before the Board of Directors, the accused may be notified at least fifteen (15) days in advance of the time and place of the hearing and must receive a written statement of the charge against him (her).

APPENDIX H.

PUBLISHED REPORTS IN THE
F.C.S.U. NEWSPAPER

March 23, 1988:

...[T]he Stephen Furdek District complained to the Insurance Department of the State of Ohio alleging violations of the Bylaws of the First Catholic Slovak Union by the Supreme President of the Society. In the allegations, the Rev. Stephen Furdek District complained to the Insurance Department of the State of Ohio that the Supreme President had exceeded his powers, failed to comply with certain provisions of Chapter 3921 of the Ohio Revised Code, had dissipated Society assets, and was conducting business FRAUDULENTLY or in a manner hazardous to the members of the First Catholic Slovak Union. The complaint to the Insurance Department of the State of Ohio was filed on behalf of the Rev. Stephen Furdek District by its President, Stephen J. Kandra, and its

Secretary, John S. Golias. For the record, it should be noted that Andrew Putka, Esq., represented the Rev. Stephen Furdek District at meetings with the Insurance Department of the State of Ohio located in Columbus, Ohio. (Emphasis supplied.)

* * * *

...[I]t [the amount mentioned earlier] was spent by defendant the First Catholic Slovak Union against a fruitless and unethical attempt to discredit our Society in the fraternal insurance system, and with the Ohio Department of Insurance. (Emphasis supplied.)

April 27, 1988:

Whereas, Andrew C. Putka has used his position as a member of the Bar of the State of Ohio to harass the President and his Board of Directors in violation of the By-laws of the First Catholic Slovak Union and without due consideration for his responsi-

bilities as a member of the Bar of the State of Ohio.

April 27, 1988:

RESOLVED, that the President and other appropriate officers of the First Catholic Slovak Union be, and they hereby are, authorized to file for and on behalf of the First Catholic Slovak Union a formal complaint before the Grievance Committee of the Ohio State Bar Association protesting the improprietary [sic] of the actions of and the harassment of the President and the Board of Directors of the First Catholic Slovak Union by attorney Andrew C. Putka, with charges to be supplied by the President and this Board of Directors of the First Catholic Union....

(3)

No. 91-1448

Supreme Court, U.S.
FILED
MAR 31 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

ANDREW C. PUTKA,
Petitioner,

vs.

FIRST CATHOLIC SLOVAK UNION OF THE UNITED STATES OF AMERICA AND CANADA, JOSEPH R. KRISTOFIK, THOMAS J. GUIDISH, CYRIL M. FERENCHAK, STEVEN G. LUCA, REV. CHARLES HAWKINS, GEORGE YAKUBISIN, ANDREW S. BENO, ANDREW MICEK, JOSEPH J. KRAJSA, EDWARD G. YUHAS, REGIS BREKOSKY, CHARLES M. TEREK, STEVE YUSKO, MICHAEL RAGAN AND MICHAEL DOBIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents disagree with Petitioner's formulation of the questions presented, because it mischaracterizes the record in this case. Respondents would state the questions presented as follows:

1. Whether Petitioner's expulsion from membership in an entirely private, voluntary fraternal organization, which involved no approval or participation of any sort by the State of Ohio, can form a basis for a claim under the U.S. Constitution.

2. Whether the Ohio courts' application of the common law doctrine of qualified privilege raises any question of federal law.

RULE 29.1 STATEMENT

Respondent First Catholic Slovak Union of the United States of America and Canada has no parent corporations and no subsidiary corporations other than wholly-owned subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.1 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PRELIMINARY STATEMENT 1

COUNTERSTATEMENT OF THE CASE 2

A. Statement of Facts 2

The Jednota, Inc. Reorganization 2

The Complaint to the Ohio Department of Insurance 2

Putka's Expulsion 3

The Appeal to the FCSU Supreme Court 4

The Appeal to the FCSU Convention 4

Jednota 5

B. Course of Proceedings and Disposition Below 5

ARGUMENT 8

I. Petitioner's Expulsion From Membership Was Entirely Private, There Was No State Action and Therefore Petitioner Cannot Claim Constitutional Protection in Connection Therewith 6

II. Application of the Common Law Qualified Privilege in This Case Raises No Federal Question 11

CONCLUSION 13

APPENDIX:

Decision of the Sixth Circuit in *Vehec v. First Catholic Slovak Union of the United States and Canada, et al.*, No. 89-3869, May 29, 1990 ..... A1

TABLE OF AUTHORITIES

Cases:

Blum v. Yaretsky, 457 U.S. 991 (1982) 7

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930) 10

Cheney v. Ketcham, 5 N.P. 139 (Lucas Cty. C.P. 1897) 6

Davis v. Hines, 6 Ohio St. 473 (1856) 6

Hahn v. Kotten, 43 Ohio St. 2d 237 (1975) 11

Herb v. Pitcairn, 324 U.S. 117 (1945) 12

Int'l Union of Steam and Operating Engineers v. Owens, 119 Ohio St. 94 (1928) 9

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 7,8

Jacobs v. Frank, 60 Ohio St. 3d 111 (1991) 11,12

John v. Paullin, 231 U.S. 583 (1913) 7

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 8

Paddock Hodge Co. v. Grain Dealers' National Ass'n, 18 Ohio App. 66 (Lucas Cty. 1921) 9

Pollock v. Cohen, 32 Ohio St. 514 (1877) 6

Postal Telegraph Cable Co. v. Newport, 247 U.S. 464 (1918) 10

State ex rel. Ohio High School Athletic Ass'n v. Judges of the Court of Common Pleas of Stark County, 173 Ohio St. 239 (1962) 9

Vehec v. First Catholic Slovak Union, No. 89-3869 (6th Cir. May 29, 1990), 1990 U.S. App. LEXIS 8705 9

West v. People's Banking & Trust Co., 14 Ohio App. 2d 69 (Washington Cty. 1967) 11

Youakim v. Miller, 425 U.S. 231 (1976) 12

Rules:

Sup. Ct. R. 10.1 13

Sup. Ct. R. 15.1 8

Sup. Ct. R. 15.3 8

Treatises:

W. Keeton, *Prosser and Keeton on The Law of Torts* (5th ed. 1984) 11

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 8

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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondents First Catholic Slovak Union of the United States of America and Canada ("FCSU"), Kristofik, Guidish, Ferenchak, Luca, Hawkins, Yakubisin, Beno, Micek, Krajsa, Yuhas, Brekosky, Terek, Yusko, Ragan, and Dobis (collectively, "Respondents") oppose the petition for certiorari. Petitioner Andrew C. Putka claims (1) that his expulsion from a non-profit fraternal organization violated the free speech and due process clauses of the United States Constitution and (2) that certain publications in the FCSU's weekly newspaper were defamatory and not protected by the common law qualified privilege.

Both assertions are incorrect. As the Ohio Court of Appeals held, no constitutional protection attaches to actions which are wholly private; and the common law qualified privilege protected the publications. Petitioner seeks to have this Court sit as a court of error on matters purely of Ohio law. This the Court should not do: the petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. Statement of Facts

The FCSU is a fraternal benefit society first incorporated in Ohio in 1892. Amended Complaint, ¶1. It provides death and disability benefits for its members and seeks to promote the spiritual and temporal welfare of its members within the Roman Catholic faith. Appendix to Petition for Writ of Certiorari (hereafter, "App. at _____") at 4. The FCSU has its own internal form of governance and Bylaws which all members agree to obey. App. at 8. The individual respondents were members of the FCSU's Board of Directors. App. at 2-3.

The Jednota, Inc. Reorganization

In March, 1986, the Board of Directors of the FCSU authorized the creation of subsidiary corporations (the "reorganization"), as a response to certain tax-related concerns. App. at 4-5. As of September 29, 1986, the FCSU organized Jednota, Inc., a wholly-owned subsidiary holding company, and three subsidiaries thereof. The Ohio Department of Insurance (the "Department of Insurance"), which by statute oversees certain aspects of the FCSU's operations, approved the reorganization. App. at 5-6.

The Complaint to the Ohio Department of Insurance

On or about May 12, 1987, the Reverend Stephen Furdek District of the FCSU sent a formal complaint to the Department of Insurance concerning the reorganizations. App. at 15. Petitioner Putka was one of the complainants, and though he now claims to have been acting solely as a lawyer, Petition For Writ of

Certiorari (hereafter, "Pet. at _____") at 24, the Department of Insurance specifically identified him as a complainant. Before filing the complaint with the Department of Insurance, Putka failed to bring the subject of the complaint before the FCSU, as is required by Section 16.11 of the FCSU Bylaws. App. at 7.

The Department of Insurance undertook an extensive investigation of the allegations of Putka's complaint. On December 15, 1987, a Report of Investigation was issued by the Department of Insurance. That report found that

> Neither the evidence presented by the complainants, nor the evidence developed in the Department's investigation warrants proceeding with a show cause hearing pursuant to Ohio Revised Code Section 3921.26.

App. at 6. It concluded that "nothing in this investigation warrants reconsideration of the determinations made by the Department" when the reorganization plan had originally been submitted to the Department of Insurance for review in 1986.

Putka's Expulsion

In February, 1988, Putka and two other Furdek District members were formally charged with violations of the FCSU Bylaws. App. at 6-7. At the Annual Board of Directors Meeting held on March 23, 1988, the Board found, among other things, that Putka and the two others had violated several FCSU Bylaw provisions in connection with their attack on the reorganization. Accordingly, the Board unanimously resolved that Putka and the two others be expelled from membership in the FCSU. App. at 7.

The Appeal to the FCSU Supreme Court

Putka appealed the decision of the Board of Directors to the Supreme Court of the FCSU. App. at 8. After oral argument, consideration of briefs, and several hours of deliberation, the FCSU Supreme Court issued a written opinion, which held (1) that Putka had violated the FCSU Bylaws and (2) that his expulsion was "therefore, proper and in accordance with the F.C.S.U. Bylaws." The Supreme Court revised the penalty imposed on Putka from expulsion to a one-year suspension. App. at 8. Thus, the FCSU Supreme Court found that Putka's punishment was proper under the facts and governing Bylaws but decided, in its discretion, not to expel.

The Appeal to the FCSU Convention

Putka appealed the FCSU Supreme Court's decision to the FCSU Convention, which was held from August 14-19, 1988, in Pittsburgh, Pennsylvania. The Convention consists of delegates elected by each FCSU branch and district, and is the supreme legislative and judicial tribunal in the FCSU. App. at 8.

A grievance committee was appointed to consider Putka's appeal and to make recommendations to the entire Convention. App. at 8. Putka was requested to contact the grievance committee chairman, but he refused to do so. The grievance committee held three sessions to consider the expulsion, none of which Putka deigned to attend. *Id.* The grievance committee recommended to the Convention that the Board of Directors' decision to expel Putka be reinstated. The Convention voted to accept the recommendations of the grievance committee and to expel Putka from the FCSU, by vote of 281 to 192. *Id.*

Jednota

Jednota ("Our Union") is the official newspaper of the FCSU. App. at 6. The FCSU Bylaws *require* that all official communications be published in *Jednota;* that "reports and information necessary to promote the welfare of the [FCSU]" be published, *Bylaws*, section 7.05(g); and that all proceedings of the FCSU Supreme Court be published, *id.*, section 7.08(d). The four publications which Putka alleged were defamatory, Amended Complaint, paragraph 14, were all published in accordance with the FCSU Bylaws. App. at 26.

B. Course of Proceedings and Disposition Below

Petitioner filed this action in July, 1988, alleging various claims related to his expulsion from membership in the FCSU. Petitioner amended the complaint in December, 1988 to recite claims for "disregard" of his rights under the FCSU Bylaws and of unspecified rights under the "laws and Constitution of Ohio," Amended Complaint, paragraph 11, intentional infliction of emotional distress, *id.*, paragraph 12, and defamation, *id.*, paragraph 14. The amended complaint made *no* claim under the U.S. Constitution or other federal law. The *only* reference to federal law is in the prayer, where petitioner requested, *inter alia*, an "injunction enjoining" Respondents from depriving Petitioner "from . . . exercising his rights under the Bylaws of the FCSU and secured to him by the laws and Constitution of Ohio and of the United States."

On December 12, 1989, the Cuyahoga County Court of Common Pleas granted defendants' motion for summary judgment as to all claims, and Putka appealed. The Eighth District Court of Appeals affirmed the grant of summary judgment in all respects, on August 15, 1991, App. at 2-28. The Ohio Supreme Court dismissed Petitioner's appeal for lack of a substantial constitutional question, App. at 1.

ARGUMENT

I. Petitioner's Expulsion From Membership Was Entirely Private, There Was No State Action and Therefore Petitioner Cannot Claim Constitutional Protection in Connection Therewith.

Petitioner simply has no business being in this Court, because the action he complains of was entirely private, and, for that reason, he cannot claim violation of any federal constitutional provision. Petitioner's argument to the contrary proceeds thus: because the FCSU is "regulated, supervised and controlled in detail" by the Ohio Superintendent of Insurance, and because the Superintendent's approval was necessary for the reorganization plan, there was sufficient nexus between the conduct complained of and the State.

That argument was not made in the Ohio courts. First, there is no reference to federal law in the amended complaint except a generalized and gratuitous reference in the prayer. Petitioner's briefs in the Ohio Court of Appeals contain mere references to, *e.g.*, "the controlling laws of our land," Brief for Appellant at 9, 13, and his "right of free speech," *id.* at 18, 19. Those briefs did not reference the U.S. Constitution, the state action doctrine, or any cases addressing those issues. Virtually all the citations in those briefs were of Ohio cases.

In Ohio, it is necessary that assignments of error be specified, Ohio R. App. P. 16(A). Absent such assignments, they will not be considered on appeal. Ohio R. App. P. 12(A); *Pollock v. Cohen*, 32 Ohio St. 514 (1877), *syllabus* ¶1-2. Moreover, the Ohio Supreme Court will not consider errors not raised in the intermediate court, *Davis v. Hines*, 6 Ohio St. 473 (1856). And where the state's procedures require that assignments of error

be made or waived, this Court will require likewise. "[T]he state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." *John v. Paullin*, 231 U.S. 583, 585 (1913).

Thus, Petitioner has waived his alleged Constitutional violations. But even if that were not true, his argument ignores this Court's long precedent on matters of state action. As this Court has held, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment," *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974). The inquiry, rather, "must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351. The purpose of that requirement "is to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains," *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original).

There is no such nexus here. The "state action" alleged by Petitioner is attenuated indeed: the state approved the reorganization, which "provoked the concern and interest of" Petitioner, which led him to file a complaint with the Department of Insurance, which caused him to be expelled. Pet. at 19-20. However, the State did not have any connection with the expulsion, *which is the only conduct complained of.* (This lawsuit has never included a claim based on the reorganization—it included only claims based on Petitioner's expulsion.) The State did not approve, sanction, or participate in the expulsion in any way. It is

the conduct complained of, not the mere fact that defendant itself is regulated in some aspects, that can make for "state action," *e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. at 358; *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 176-77 (1972) (regulation cannot be said to make the state a partner in private club's enterprise; thus no state action).

Next, Petitioner reargues matters of state law already decided by the Ohio courts, Pet. at 23-38, and seeks to have this Court revisit the two allegedly "erroneous" bases for the decision of the Ohio Court of Appeals. Because there is no question of state action or other federal question, this Court need not and should not address those matters. (Even if the decision were erroneous, and it is not, this Court is not primarily concerned with the correction of errors in the lower courts. Absent other factors, error itself will not suffice for grant of certiorari, *see* R. Stern, E. Gressman and S. Shapiro, *Supreme Court Practice*, 221-22 (6th ed. 1986).)

Moreover, Petitioner's reargruments of state law are erroneous substantively. Consistent with Supreme Court Rules 15.1 (obligation of the Respondent to point out misstatements) and 15.3 (brief in opposition shall be as short as possible) Respondents will address them briefly.

Ohio courts give great deference to the rulings of internal tribunals of voluntary organizations:

> It is well established that courts will not interfere with the internal affairs of voluntary associations, except in such cases as fraud or lack of jurisdiction . . . . The decisions of the tribunals of an association with respect to its internal affairs will, in the absence of mistake, fraud, collusion, or arbitrariness, be accepted by the courts as conclusive. Moreover, it is held that the courts will

> not undertake to inquire into the regularity of the procedure adopted and pursued by such tribunals in reaching their decisions.

State ex rel. Ohio High School Athletic Ass'n v. Judges of the Court of Common Pleas of Stark County, 173 Ohio St. 239, 247 (1962). Before he or she is expelled, a member of a voluntary organization must have notice of the charges and an opportunity to defend against them, *Cheney v. Ketcham,* 5 N.P. 139 (Lucas Cty. C.P. 1897). However, the internal procedures applicable to expulsion of members need not mirror the procedures inherent in our civil or criminal justice system, *Ohio High School Athletic Ass'n,* 173 Ohio St. at 247; *Paddock Hodge Co. v. Grain Dealers' National Ass'n,* 18 Ohio App. 66 (Lucas Cty. 1921). *See also Vehec v. First Catholic Slovak Union,* No. 89-3869 (6th Cir. May 29, 1990), 1990 U.S. App. LEXIS 8705 (summary judgment affirmed in case involving legal claims virtually identical to those in this case; *following Ohio High School Athletic Ass'n*) (See Appendix to this Brief, A1-A11).

The Ohio Court of Appeals held that Petitioner "clearly was afforded all the essentials of due process," and that he had "failed to produce any evidence of mistake, fraud, or management activity in excess of corporate powers." App. at 20. The court further found that bylaw provisions such as FCSU Bylaw 16.11 (requiring exhaustion of internal remedies before resort is made to civil authorities) should be upheld under Ohio law. App. at 19-20. *See also Int'l Union of Steam and Operating Engineers v. Owens,* 119 Ohio St. 94, 98-99 (1928). The above described holdings of the Ohio appellate court involve matters relating exclusively to Ohio law, which should be dispositive here.

Finally, Petitioner argues that the state court's "imprimatur" on his expulsion allows this Court to review the underlying (though never before asserted) constitutional claims. Pet. at 40-45. That is not the law. Unlike *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464 (1918) and *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930), the two cases upon which Petitioner relies, this case involves no deprivation of notice and an opportunity to be heard. Both those cases involved anomalous circumstances in which the state court had deprived plaintiffs of existing remedies for enforcement of rights—in *Postal Telegraph*, by *res judicata*, and in *Brinkerhoff-Faris*, by denial of a newly-created right of relief. In contrast, the Ohio courts here denied Petitioner his requested relief on the merits because his claims were unquestionably unfounded under well-settled Ohio law. Because the state courts have the supreme power to interpret state law, *Brinkerhoff-Faris*, 281 U.S. at 682, and because the Ohio courts determined that, as a matter of state law, Petitioner had failed to raise a genuine issue of material fact to support his claims, he can make no constitutional claim.

II. Application of the Common Law Qualified Privilege In This Case Raises No Federal Question.

In his statement of the Questions Presented, and again in the body of his brief, Petitioner appears to argue that the Ohio courts wrongly afforded the FCSU a "constitutional" privilege, and that, in the context of this case, "damages for false and defamatory statements are not prohibited by the First Amendment." Pet. at 50. There are two fatal flaws in that argument. First, it was never presented to the Ohio courts; second, the Ohio courts did not rule on constitutional privilege, but on the common law qualified privilege.

Under Ohio common law, communications are protected by a qualified privilege when they are made "in good faith on any subject matter in which the person communicating has an interest . . . if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable . . ." *West v. People's Banking & Trust Co.*, 14 Ohio App. 2d 69, 72 (Washington Cty. 1967); *accord, Jacobs v. Frank*, 60 Ohio St. 3d 111 (1991); *Hahn v. Kotten*, 43 Ohio St. 2d 237, 244 (1975). That privilege is a venerable one. It arose before the development of First Amendment privileges and today exists independent of them, *see* W. Keeton, *Prosser and Keeton on The Law of Torts*, §115 (5th ed. 1984).

The Ohio Court of Appeals rested its decision on the common law privilege. Constitutional privilege was never addressed, and there was clearly independent and adequate state ground for the holding. Petitioner never argued, and does not argue here, that application of the privilege in this case was in any sense violative of federal constitutional protections. Thus, to ask, as Petitioner does, Pet. at 49-50, "whether the facts of the present

case are wholly within the First Amendment concerns expressed by this Court in *New York Times Co.* and its progeny" is simply a *non sequitur.* As a matter of *Ohio* law, the publications were privileged, and this Court will not disturb state rulings on state law. *Herb v. Pitcairn,* 324 U.S. 117, 125-26 (1945).

Furthermore, whatever argument Petitioner now makes under the U.S. Constitution was never made in Ohio. In the Court of Appeals, Petitioner *conceded* that the qualified privilege was applicable, but argued only that the publications in question had been "unnecessarily defamatory," App. at 24. Nor was any federal constitutional argument made as to the defamation claim in Petitioner's Memorandum in Support of Jurisdiction in the Ohio Supreme Court. This Court does not decide questions not raised in the lower courts, *Youakim v. Miller,* 425 U.S. 231, 234 (1976), and so should deny the petition on that ground alone.

Even if the defamation claim were appropriate for review here (and, involving no federal question, it is not), Petitioner makes no showing of the "actual malice" necessary to defeat the qualified privilege. In an Ohio qualified privilege case, plaintiff must show that the statements were made with knowledge of their falsity or with reckless disregard as to truth or falsity. *Jacobs v. Frank,* 60 Ohio St. 3d at 116. Petitioner refers to "the unrefuted evidence," Pet. at 48, but specifies none, and no wonder: two Ohio courts found no genuine issue of material fact on the issue of qualified privilege, and the third (the Ohio Supreme Court) found no reason to review that determination. For these reasons, the petition as to the defamation claim should be denied.

CONCLUSION

The Petition should be denied because Petitioner's expulsion involved no state action and thus no constitutional protection attaches; and because there is no federal question as to the defamation claim. Moreover, this case presents no "special and important reasons" why certiorari should be granted within the meaning of Supreme Court Rule 10.1. Accordingly, the petition should be denied.

Respectfully submitted,

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APPENDIX

[Filed May 29, 1990]

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
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No. 89-3869

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH R. VEHEC,
Plaintiff-Appellant,

v.

FIRST CATHOLIC SLOVAK UNION OF THE UNITED STATES AND CANADA, JOSEPH R. KRISTOFIK, CYRIL M. FERENCHAK, STEVEN G. LUCA, and JOHN YENCIK,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BEFORE: KENNEDY and RYAN, *Circuit Judges*; and COOK, *Chief District Judge.*[1]

PER CURIAM: Appellant Joseph R. Vehec brought this action against his former employer, the First Catholic Slovak Union of the United States and Canada (FCSU), a non-profit fraternal benefit society; Joseph R. Kristofik, the society's president; Cyril M. Ferenchak, the society's treasurer; Steven G. Luca, a member of the society's board of directors; and John Yencik, a marketing consultant of the society. In his amended complaint, appellant asserted the following causes of action: breach of contract; malicious violation of state and federal constitutional rights to due process; malicious violation of the FCSU by-laws; intentional infliction of emotional distress; and defamation. The District Court granted appellees' motion for summary judgment on all claims. We AFFIRM the judgment of the District Court.

FCSU is a private, non-profit association whose members share a common religious and ethnic heritage. It is administered by various "supreme officers," including an executive secretary, in accordance with its own by-laws. In 1982, appellant was elected to serve a three-year term as executive secretary. As such, he received a salary and the use of living quarters and office space on the premises of the FCSU home office in Cleveland. His responsibilities included financial management and record keeping for the entire organization. In August of 1985, the regular convention of the FCSU re-elected him for a second term of office, to run until March of 1989.

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[1] The Honorable Julian Abele Cook, Jr., Chief United States District Judge for the Eastern District of Michigan, sitting by designation.

Audits conducted in 1987 revealed various irregularities in Vehec's use of FCSU funds. The specifics of these were detailed in a letter dated August 7, 1987, from Luca to Kristofik. At its semi-annual meeting, held August 16-20, 1987, the FCSU board of directors considered the contents of the letter. Having been asked at that meeting to respond to the letter, Vehec prepared an answer, which was considered at a meeting of the executive committee held on September 22, 1987.

According to Kristofik, following that meeting, Kristofik, as the supreme president of the FCSU, informed Vehec by letter of the same date that Vehec was suspended without pay effective immediately until a special meeting of the board could be convened. On September 24, 1987, Kristofik told Vehec in person that Vehec was suspended and that he and his family had to vacate the premises at the FCSU headquarters. On November 3, 1987, the board of directors held a special meeting during which, by official vote, Vehec was terminated as executive secretary.

Vehec claims that Kristofik, accompanied by Luca and Yencik, discharged him as opposed to suspending him in September of 1987, and ordered him and his family to vacate their living quarters that same day. He alleges further that, despite the by-laws' requirement, he received no written statement of the charges against him which were to be considered at the November 3, 1987 meeting; that he received no notice of that board meeting; and that he was therefore not afforded the opportunity guaranteed him by the FCSU by-laws to appear and defend himself.

Vehec appealed the board's November 3rd decision by filing a notice of appeal with the FCSU supreme court on November 24, 1987. On January 9, 1988, after a hearing, that court entered an order upholding Vehec's termination as in conformity with the FCSU by-laws.

Vehec did not take what would have been, under the association's internal rules, the next and final appeal of that judgment—an appeal to the FCSU convention. He did, however, request that the FCSU supreme court reconsider its January 9th ruling. He added this request to his appeal of the board of directors' March 23, 1988 decision to expel him from membership in the FCSU. That court declined to do so, ruling on June 3, 1988 that this effort was barred by res judicata. Under FCSU's governing rules, this decision ended appellant's right to challenge the actions taken against him by the association's authorized decision makers.

In the months that followed, three articles appeared in the official FCSU publication, *Jednota*, discussing the above events. Two of these were written by Kristofik, as president of the FCSU, and one by Michael Ridilla, as president of the FCSU supreme court. The District Court noted that Vehec did not allege that these articles were circulated more broadly than to the FCSU membership, or that they were written by Kristofik and Ridilla in capacities other than as officials of this private association.

The District Court found that the FCSU is subject to the provisions of section 1702.34(B) of the Ohio Revised Code, and that a plain reading of that provision makes it clear that no state law contract rights arise under the provision of FCSU's by-laws. The court further found that even if Vehec's reliance on the by-laws were

not barred by this provision, his breach of contract claim would nevertheless be barred by Ohio's statute of frauds. The District Court also found that appellant's fourteenth amendment claim failed because he alleged no state action and no state action existed. Appellant also argued that FCSU violated the due process rights afforded him by the FCSU by-laws. The court noted that under Ohio law, in the absence of mistake, fraud, collusion or arbitrariness, the decisions of tribunals of voluntary associations must be accepted by the courts as conclusive. Because appellant produced no evidence demonstrating circumstances warranting judicial intervention, the court accepted the decision of the FCSU tribunals. The District Court also found that appellant failed to make out a claim for intentional or reckless infliction of emotional distress, and did not produce factual support for his claim of defamation. Therefore, the District Court granted appellees' motion for summary judgment.

Appellant first argues that the District Court erred in awarding summary judgment for appellees because appellant was "tried and condemned *in absentia* by the Board in violation of the due process provisions of the Bylaws." In response to this contention, the District Court responded:

> On the question of the extent to which any court, either state or federal, may review the decisionmaking procedures of private associations incorporated under Ohio law, the law is well-settled. In the absence of mistake, fraud, collusion, or arbitrariness, the decisions of the tribunals of such voluntary associations must be accepted by the courts as conclusive. *State ex rel. Ohio High School Athletic Association v. Judges of the Court of Common Pleas of Stark County*, 173 Ohio St. 239, 247, 181 N.E.2d 261, 266-67 (1962).

The court found that Vehec had not produced any evidence demonstrating circumstances warranting judicial intervention.

Appellant argues that the District Court misapprehended the meaning of the *Ohio Athletic Association* case because it failed to quote the following language from the opinion:

> Even more to the point is the following language . . .:
>
> > "The decisions of any kind of voluntary society or association in disciplining, suspending, or expelling members are of a quasi judicial character. In such cases the courts never interfere except to ascertain whether or not the proceeding was pursuant to the rules and laws of the society, whether or not the proceeding was in good faith, and whether or not there was anything in the proceeding in violation of the laws of the land."

State ex rel. Ohio High School Athletic Ass'n v. Judges of the Court of Common Pleas, 173 Ohio St. 239, 247, 181 N.E.2d 261, 266 (1962) (quoting 4 American Jurisprudence 466, section 27).

We do not believe the omission of this language indicates that the District Court misapprehended the Ohio court's holding. Considering this language as well as that quoted by the District Court, we agree with the court's finding that appellant did not produce any evidence demonstrating circumstances warranting judicial intervention.

We also agree with the District Court that appellant has not shown that FCSU's by-laws were violated. Appellant asserts that the power to permanently dismiss a supreme officer is granted exclusively to the board of directors by sections 9.04(e) and (f). These sections state

that the board has jurisdiction "to hear and pass upon all complaints, grievances or violation[s] of the Bylaws and to impose penalty as provided in Section 16 of these Bylaws,"[2] and may "[d]ismiss from office after due hearing and a trial, any supreme or local officer . . . who fails to perform his (her) duties, or violates any provision of these Bylaws." These sections do not grant *exclusive* authority to the board. In fact, the president, Kristofik, acted pursuant to his authority to dismiss officers for violations of the by-laws, granted by section 7.03(j). This section provides, in part:

> President is to preside at all meetings of the Supreme Officers and shall:
>
> . . .
>
> (f) Arrange to investigate any irregularities and misunderstandings existing in any branch. All reports received shall be submitted to the Board of Directors at their next meeting.
>
> . . .
>
> (j) Dismiss Supreme Officers, officers of local branches for violations of these Bylaws or orders of the Supreme President, with a right of appeal.
>
> . . .
>
> (m) Render decisions on all questions concerning the construction of Bylaws which shall be binding on all Officers, unless reversed by the Board of Directors or the Convention.
>
> . . .

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[2] Section 16.03(a) provides:

> When charges are preferred before the Board of Directors, the accused may be notified at least fifteen (15) days in advance of the time and place of the hearing and must receive a written statement of the charge against him (her).

> (o) With the approval of two-thirds of the Board of Directors, reprimand and for a serious offense, suspend any Supreme Officer for failure to perform his (her) duties.

Section 7.03 does not require a trial.[3] Thus appellant's argument that because he did not have a trial, the by-laws were violated, is without merit.

Section 7.03 does afford appellant a right of appeal. Appellant availed himself of this right. He filed a notice of appeal with the FCSU supreme court on November 24, 1987, and on January 9, 1988, after a hearing, the supreme court entered an order upholding Vehec's termination as in conformity with the FCSU by-laws. Appellant waived his right of further appeal to the FCSU convention by failing to appeal within the time period mandated by the by-laws. Thus appellees did not violate the by-laws. Further, appellant's argument that he was denied due process is without merit in light of these procedural protections. He was provided with notice and an opportunity to defend himself, and therefore he was not denied due process. *Normali v. Cleveland Ass'n of Life Underwriters,* 39 Ohio App. 2d 25, 31, 315 N.E.2d 482 (1974).

Appellant next argues that the District Court erred in finding that there was not an enforceable employment contract in effect at the time of Vehec's termination. Appellant argues that his election to the office of executive secretary created a legally binding contract between him and the FCSU under the terms and conditions of the by-laws. He argues that section 4.03 of the by-laws, entitled "Member Contract" states that "[t]he contract agreement between the Society and the

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[3] Section 16.03(b)(3) provides that no trial shall be necessary "whenever the Bylaws provide for . . . removal from office or expulsion or fine without trial or notice."

member shall contain . . . (3) Bylaws of the Society." This membership contract, however, is wholly unrelated to any employment contract appellant may have had with the FCSU. Appellant also argues that the proceedings of the convention that elected him as executive secretary were memorialized by written minutes, and that these minutes together with the by-laws are evidence of a contract. However, as the District Court found, the FCSU, as a non-profit corporation organized under the law of Ohio, is subject to the provisions of section 1702.34(B) of the Ohio Revised Code, which provides in part:

> (B) Unless the articles or the regulations otherwise provide, . . .
>
> . . .
>
> (2) Any officer may be removed, with or without cause, by the persons authorized to elect or appoint him without prejudice to the contract rights of such officer. *The election or appointment of an officer for a given term, or a general provision in the articles, the regulations, or the bylaws with respect to term of office, shall not be deemed to create contract rights* . . . .

Ohio Rev. Code Ann. §1702.34(B) (Anderson 1985) (emphasis added).

The by-laws of FCSU do not "otherwise provide." Therefore, no state law contract rights arise as a result of appellant's election.[4]

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[4] The District Court found that appellant's breach of contract claim would be barred by Ohio's statute of frauds as well. Appellant contends that corporate minutes can constitute a memorandum satisfying the requirements of the statute of frauds. He cites *Soteriades v. Wendy's of Fort Wayne, Inc.*, 34 Ohio App. 3d 222, 225, 517 N.E.2d 1011 (1986), for this proposition. The minutes in that

(Footnote continued on following page.)

Appellant next argues that the District Court erred in finding that no genuine issue of material fact existed with respect to appellant's intentional or reckless infliction of emotional distress claim and that appellees were entitled to judgment as a matter of law.[5] To be liable for this tort, the appellees must have "by extreme and outrageous conduct intentionally or recklessly cause[d] severe emotional distress" to appellant. *Yeager v. Local Union 20,* 6 Ohio St. 3d 369, 374, 453 N.E.2d 666, 671-72 (1983) (quoting Restatement of the Law 2d, Torts 73, section 46(1), comment d (1965)). The conduct must have been "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 375. The Ohio courts have applied this standard with even greater stringency in employment actions. *Crawford v. ITT Consumer Fin. Corp.,* 653 F. Supp. 1184, 1192 (S.D. Ohio 1986). We agree with the District Court that the conduct complained of in the present case cannot meet these high standards.

Appellant's final argument is that the District Court erred in finding that there were no genuine issues of material fact regarding the defamation cause of action,

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(Footnote continued from preceding page.)

case, however, were much more detailed than those in the present case. In the present case, the minutes cannot be said to "contain the essential terms of the contract, expressed with such clearness and certainty, that they may be understood from the writing itself, or some other paper to which it refers, without the necessity of resorting to parol proof." *Kling v. Bordner,* 65 Ohio St. 86, 99, 61 N.E. 148 (1901).

[5] Appellant also argues that he is entitled to punitive damages because the alleged breach of contract amounts to an independent willful tort. Because we have found that no contract and therefore no breach exists in the present case, we need not reach this issue.

and that appellee was entitled to judgment as a matter of law. The publications in which the allegedly defamatory articles were printed are protected by a qualified privilege, because the author and the readers share "a common interest, and the communication is of a kind reasonably calculated to protect or further it." *Hahn v. Kotten*, 43 Ohio St. 2d 237, 244, 331 N.E.2d 713, 718 (1975). In order to recover, appellant must have demonstrated falsity and actual malice. We agree with the District Court that appellant failed to go beyond his pleadings to produce factual support for his allegation of actual malice. Appellant has not convinced us otherwise in his appeal.

Accordingly, we AFFIRM the District Court's order granting appellee's motion for summary judgment.